



[4310-6W-P]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

[K00103 12/13 A3A10; 134D0102DR-DS5A300000 DR.5A311.IA000113, Docket ID: BIA-2013-0005]

RIN 1076-AF15

Land Acquisitions: Appeals of Land Acquisition Decisions

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final Rule.

SUMMARY: This final rule revises a section of regulations governing decisions by the Secretary to approve or deny applications to acquire land in trust under this part. This rule addresses changes in the applicability of the Quiet Title Act as interpreted by a recent United States Supreme Court decision and broadens and clarifies the notice of decisions to acquire land in trust, including broadening notice of any right to file an administrative appeal.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION:

- I. Executive Summary of Rule
- II. Background
- III. Explanation of the New Rule

- A. Deleting the 30-Day Waiting Period
- B. Requiring Notification of Known and Unknown Interested Parties of the Decision and Administrative Appeal Rights
- C. Exhaustion of Administrative Remedies
- IV. Comments on the Proposed Rule and Responses
- IV. Procedural Requirements
 - A. Regulatory Planning and Review (E.O. 12866 and 13563)
 - B. Regulatory Flexibility Act
 - C. Small Business Regulatory Enforcement Fairness Act
 - D. Unfunded Mandates Reform Act
 - E. Takings (E.O. 12630)
 - F. Federalism (E.O. 13132)
 - G. Civil Justice Reform (E.O. 12988)
 - H. Consultation with Indian Tribes (E.O. 13175)
 - I. Paperwork Reduction Act
 - J. National Environmental Policy Act
 - K. Effects on the Energy Supply (E.O. 13211)

I. Executive Summary of Rule

Section 5 of the Indian Reorganization Act (IRA) (25 U.S.C. 465) authorizes the Secretary of the Interior to acquire land in trust for individual Indians and Indian tribes. The Department of the Interior's regulations at 25 CFR part 151 implement this statutory provision of the IRA, as well as other statutes authorizing the acquisition of land in trust. Prior to 1996, the Department announced decisions to take land into trust simultaneously with the action of taking the land into trust. According to then-prevailing court decisions, once the land was taken in trust, judicial review was very limited. Consequently, the Department decided to create a time-limited opportunity for judicial review. In 1996, the Department revised part 151 by procedural rulemaking. In response to *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), the Department established a procedure to ensure the opportunity for judicial review of administrative decisions to acquire title to lands in trust for Indian tribes and individual Indians. That procedural rule added a paragraph (b) to § 151.12, which established a 30-day waiting period following publication of notice in the Federal Register or in a newspaper of

general circulation serving the affected area announcing the final agency determination to take the subject land into trust. Paragraph (b) was intended to provide a brief window of time in which interested parties had the opportunity to seek judicial review under the Administrative Procedure Act (APA) (5 U.S.C. 704) before the Secretary acquired title to land in trust. *See* 61 FR 18082 (Apr. 24, 1996). The Department had determined such a rule was necessary because, at that time, prevailing Federal court decisions found that the law precluded judicial review of the decision after the United States acquired title. *See, e.g., Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004); *Metro Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987); *Florida Dep't of Bus. Regulation v. Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985).

The legal landscape changed on June 18, 2012, when the Supreme Court issued its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (“*Patchak*”). In that decision, the Supreme Court held that the Quiet Title Act (QTA), 28 U.S.C. 2409a, nor Federal sovereign immunity is a bar to APA challenges to the Secretary’s decision to acquire land in trust after the United States acquires title to the property, unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge. Following *Patchak*, the 1996 procedural rule establishing a 30-day waiting period is no longer needed because interested parties may have the opportunity to seek judicial review of the Secretary’s decision under the APA even after the Secretary has acquired title to the property.

On May 29, 2013, the Bureau of Indian Affairs (BIA) published a proposed rule that would remove the 30-day waiting period and make other changes to clarify the Department’s process for issuing trust acquisition decisions. 78 FR 32214. BIA then extended the original comment deadline of July 29, 2013 to September 3, 2013. *See* 78 FR 49990 (Aug. 16, 2013).

Following tribal consultation and analysis of comments on the proposed rule, the BIA is now publishing a final rule. This final rule revises section 151.12 to:

- Provide clarification and transparency to the process for issuing decisions by the Department, whether the decision is made by the Secretary, Assistant Secretary – Indian Affairs (AS-IA), or a Bureau of Indian Affairs (BIA) official;
- Ensure notice of a BIA official decision to acquire land into trust, and the right, if any, to file an administrative appeal of such decision by requiring written notice to all interested parties who have made themselves known in writing to the BIA official, as well as State and local governments having regulatory jurisdiction over the land to be acquired, and expanding notice through newspaper publication; and
- Repeal the 1996 procedural provision and make explicit that parties must exhaust administrative remedies prior to pursuing judicial review for BIA trust acquisitions.

II. Background

Congress enacted the IRA in 1934 to halt and remedy the devastating effects of prior policies of allotment and assimilation and to secure for all Indian tribes a land base on which to engage in economic development and self-determination. During the allotment era, Indian-owned lands diminished drastically. Even today, most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes, helps generate revenues for public purposes, and helps protect tribal culture and ways of life (e.g., housing for tribal citizens, energy and natural resource development, protections for subsistence hunting and agriculture).

This Administration has earnestly sought to advance the IRA policy goals of protecting

and restoring tribal homelands and promoting tribal self-determination. The Secretary's authority to acquire lands in trust for all Indian tribes, and ability to provide certainty concerning the status of and jurisdiction over Indian lands, reaches the core of the Federal trust responsibility. To carry out the Secretary's delegated authority under the IRA, decisions to acquire land in trust are delegated either to the AS-IA or to a BIA official. The vast majority of trust acquisition decisions are delegated to and issued by BIA officials. Only a small percentage of decisions are reviewed and considered by the AS-IA. These decisions involve extensive public participation and several layers of review by Department officials before issuance.

The existing regulations that apply to all AS-IA and BIA decisions include different means and timelines for challenging decisions depending on whether the decision is issued by the AS-IA or a BIA official. This final rule clarifies these distinctions within the context of trust acquisition decisions.

- If the AS-IA issues the decision under this part, the decision is a "final agency determination," and the decision is final for the Department. *See* 25 CFR 2.6(c). A party may then seek judicial review of this decision under the APA.
- If a BIA official issues the decision under this part, the decision is subject to the administrative exhaustion requirements of 25 CFR part 2 before it becomes a "final agency determination." Under these regulatory requirements, interested parties have a 30-day period in which to file an appeal of the BIA official's decision. *See* 25 CFR 2.9. If no appeal is filed within the 30-day administrative appeal period, then the BIA official's decision becomes final for the Department. If an administrative appeal of a

BIA official's decision is timely filed with the IBIA¹ (and not precluded due to some other legal or procedural reason, such as standing), then the BIA official's decision is final for the Department after the IBIA affirms the decision.² Today's rulemaking makes explicit the requirement that prior to seeking judicial review of a BIA official's decision, a party must first exhaust the administrative remedies available under 25 CFR part 2.

III. Explanation of the New Rule

This rule revises § 151.12 to remove procedural requirements that are no longer necessary in light of *Patchak* and to increase transparency regarding the process for issuing decisions to acquire land in trust under this part. For clarity purposes, this preamble will refer to the regulatory provision codified at § 151.12 in effect from 1996 until the effective date of this final rule as “the existing rule” and will refer to the final rule published today as the “final rule” or “new rule.”

A. Deleting the 30-Day Waiting Period

The existing rule provides that the Secretary shall publish a notice of the decision to take land into trust and that the Secretary would acquire title to the subject property no sooner than 30 days after the notice was published. This 30-day waiting period was added to § 151.12 in 1996 to allow parties to seek judicial review of the Secretary's decision under the APA. *See* 61 FR 18082 (Apr. 24, 1996). The United States' position at the time, consistent with the position of

¹ In those cases in which the Superintendent first issued the decision, the administrative appeal would first be filed with the Regional Director. If the Regional Director affirms the Superintendent's decision, an administrative appeal of the Regional Director's decision could then be filed with the IBIA.

² Department regulations provide that the Secretary may take jurisdiction over any matter pending before the Department under 43 CFR 4.5, and that the AS-IA may take jurisdiction from IBIA to review a BIA official decision under 25 CFR 2.20.

several Federal circuit courts of appeal, was that the QTA precluded judicial review of the Secretary's decision if the United States held title to the land at issue. *Id.* The Supreme Court has since held in *Patchak* that the Indian lands exception to the QTA's waiver of United States sovereign immunity for quiet title actions does not itself bar judicial review under the APA of the Department's decision to acquire land in trust unless the aggrieved party seeks to quiet title to the subject property. In light of this decision, waiting 30 days after the issuance of a final trust acquisition decision before the Department take the land into trust is now unnecessary. Accordingly, the new rule provides that the Secretary shall, immediately after the decision to acquire land in trust is final for the Department, complete the trust acquisition pursuant to 25 CFR 151.14 after fulfilling the requirements of 25 CFR 151.13 and any other Departmental requirements.

B. Requiring Notification of BIA Officials' Decisions and Administrative Appeal

Rights to Known and Unknown Interested Parties

Under existing regulations, BIA officials who issue decisions under this part are required to provide known interested parties with written notice of such decisions. *See* 25 CFR 2.7(a). To ensure that such parties are receiving written notice, the new rule requires interested parties, as that term is currently defined in part 2, to make themselves known to the BIA official in writing in order to receive written notice of the BIA official's decision.³ Interested parties need only provide written notification to the BIA official prior to the decision being made.⁴

³ For example, a party that submits written comments to the BIA official in connection with a pending application has made itself "known" to the BIA official and will be provided written notice of the decision when issued.

⁴ Interested parties may contact the regional BIA office tasked with serving the applicant to obtain the name and contact information of the BIA official responsible for issuing a decision on the application. Contact information for the BIA and its regional offices can be found at www.bia.gov.

Notices of BIA officials' decisions will continue to include information concerning the process for filing an administrative appeal of the decision, consistent with 25 CFR 2.7(c).

Interested parties who appeal a BIA official's decision must meet standing, timeliness, and other requirements that may limit IBIA review of BIA officials' decisions. *See, e.g., Skagit County v. Nw. Reg'l Dir.*, 43 IBIA 62, 77 (May 24, 2006) (dismissing appeal on standing grounds due to county's failure to establish that the alleged harm was caused by the decision to acquire land in trust); *No More Slots et al. v. Pac. Reg'l Dir.*, 56 IBIA 233, 242-43 (Mar. 18, 2013) (dismissing appeals as untimely).

The final rule adds the new requirement that when a BIA official approves a trust acquisition application, the official will publish notice of that decision in a newspaper of general circulation serving the affected area to reach unknown interested parties. The newspaper notice will contain the same statement that is included in the written notice of decision provided to known interested parties regarding the right, if any, to appeal. The time for unknown interested parties to file a notice of appeal begins to run upon the date of first publication of such newspaper notice.

C. Exhaustion of Administrative Remedies

Under the existing rule, administrative remedies are available under 25 CFR part 2 to challenge a BIA official's decision, and an interested party must first exhaust them before seeking judicial review under the APA. The new rule makes this requirement explicit. Under 25 CFR part 2, interested parties have 30 days from the date they receive notice of the BIA official's decision to file an administrative appeal of such decision. If interested parties fail to appeal within that timeframe, judicial review is unavailable due to the failure to exhaust administrative remedies. *See Darby v. Cisneros*, 509 U.S. 137 (1993); *Klaudt v. U.S. Department of the*

Interior, 990 F.2d 409, 411-12 (8th Cir. 1993); *Fort Berthold Land & Livestock Ass’n v. Anderson*, 361 F.Supp.2d 1045, 1051-52 (D.N.D. 2005).

When the AS-IA issues a decision to acquire land in trust under this part, the decision is final for the Department and not subject to administrative review under part 2 of this title. Still, the existing rule requires publication of notice of such a decision in either the Federal Register or a newspaper of general publication. In practice, AS-IA broadly fulfills this publication requirement by publishing notice of its decision in the Federal Register. The new rule explicitly codifies this practice. Other changes to § 151.12 are designed to increase transparency, better reflect the process for acquiring land in trust, and respond to comments, as described in the following section.

D. Summary of All Revisions to 151.12

The following table details all revisions this new rule would make to § 151.12, including changes from the proposed rule to the final rule.

Existing 25 CFR §	Existing Provision	Description of Change from Existing	Proposed 25 CFR §	Final 25 CFR §	Description of Change from Proposed
151.12(a)	“The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision.”	Moves provision regarding promptly notifying the applicant in writing of the decision to (c) and (d).	151.12(a)	151.12(a)	No substantive change from proposed.
151.12(a)	“The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision.”	No substantive change from existing.	151.12(a)	151.12(a)	No substantive change from proposed.
151.12(a)	“If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.”	States generally that the Secretary’s decision will be in writing and state the reasons for the decision, so this requirement applies regardless of whether the decision was an approval or denial. Moves the provision regarding notification of appeal rights to (d)(1) (denial decision by BIA official) and (d)(2)(ii) and (d)(2)(iii) (approval decision by BIA official).	151.12(b) & (d)	151.12(b) & (d)	No substantive change from proposed.
151.12(b)	“Following completion of the Title Examination provided in § 151.13 of this part...”	The requirement for a title examination has been moved to (c)(2)(iii) and (d)(2)(iv)(B).	152.12(c) & (d)	152.12(c) & (d)	No substantive change from proposed.
151.12(b)	“...and the exhaustion of any administrative remedies..”	The requirement for exhaustion of administrative remedies has been moved to (d), which is applicable only to decisions issued by a BIA	152.12(d)	151.12(d)	Adds explicit reference to exhaustion in (d)(2)(iv).

		official.			
151.12(b)	“...the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part.”	The requirement to publish in the Federal Register has been moved to (c)(2)(ii) (decisions by the Assistant Secretary). The requirement to publish in a newspaper has been moved to (d)(2)(iii) (decisions by a BIA official) and now occurs when BIA issues a decision to acquire land in trust, with notice of the opportunity to administratively appeal, rather than when the decision is final. Clarifies that any appeal period begins to run upon first publication. Also clarifies and expands BIA’s existing practice of providing written notice to known interested parties and State and local governments with jurisdiction over the land to be acquired of a BIA official’s decision to take land into trust.	151.12(c) & (d)	151.12(c) & (d)	Moves clarification of when the appeal period begins to run to a new (d)(3).
151.12(b)	“The notice will state that a final agency determination to take land in trust has been made and...”	States that a decision issued by the Assistant Secretary is final for the Department.	151.12(c)	151.12(c)	No substantive change from proposed.
151.12(b)	“...that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.”	Deletes statement that the Secretary will acquire title no sooner than 30 days after the notice is published. Instead, provides at (c)(2)(iii) that the Assistant Secretary will “immediately” acquire land into trust and provides at (d)(2)(iv) that the BIA official will “immediately” acquire land into trust upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of Departmental requirements	151.12(c) & (d)	151.12(c) & (d)	Changes “promptly” to “immediately” in (c)(2)(iii) and (d)(2)(iv).

IV. Comments on the Proposed Rule and Responses

We received 38 comment submissions from Indian tribes and Indian or tribal organizations; 16 from State, county, or local governments and organizations representing such governments; and 12 from members of the public, including individuals, advocacy groups and other organizations. Most tribal commenters were generally supportive of the rule, while most State, county, or local governments and organizations and members of the public were opposed to the rule. This section summarizes and addresses the comments received.

Support – General, Elimination of 30-Day Waiting Period Following AS-IA Decision

Commenters in support of the rule noted that the proposed changes achieve greater

transparency and certainty for tribes. These commenters noted that, under *Patchak*, challengers to trust acquisitions may initiate an APA lawsuit at any point during the six-year statute of limitations period following a final decision to acquire the land in trust. According to the tribal commenters, this threat of potential litigation during the six years following the issuance of a final decision creates uncertainty in the trust status of the property, discourages financial institutions from investment, and thereby frustrates tribes' ability to develop their trust lands in a productive, efficient manner for housing, economic development, or other purposes. These tribes believe the rule's elimination of the 30-day waiting period following the issuance of final trust acquisition decisions adds some measure of certainty by ensuring the land is placed into trust as soon as possible. Several tribal commenters noted that the rule does not completely remedy the situation created by *Patchak*, but encourages prompt administrative and judicial review of trust acquisition decisions.

Opposition – General, Elimination of 30-Day Waiting Period Following AS-IA Decision

Some commenters, many of whom were State and local governments, advocated for reexamining and revising all of part 151 and objected to “piecemeal” revisions. Some of these commenters expressed that the interests of State and local governments in tax revenues and regulatory jurisdiction, as well as “social and financial issues” affecting the tribal and non-tribal communities, are equally important to the goal to restore tribal homelands. *Response:* As described in the Background section of this preamble, restoration of tribal homelands is a policy goal of the IRA, which has provided authority for acquiring land in trust for nearly eight decades. The IRA reflects the unique relationship between the Federal Government and Indians and Indian tribes. The existing framework set forth in part 151 reflects this policy goal and provides for consideration of State and local government concerns. The existing part 151 process

provides State and local governments the opportunity to submit comments as to the proposed acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments, and also requires the Secretary to consider jurisdictional problems and any potential conflicts of land use that may arise in connection with the acquisition. The Supreme Court has recognized this process as "sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005). The final rule does not change this process. As such, we have determined that this narrow revision appropriately addresses the change in legal landscape following *Patchak*.

Some commenters provided various reasons why the 30-day period should be retained (e.g., to allow for the opportunity to negotiate or to identify whether contingencies in an agreement between the tribe and State or local government have been met). Some commenters also claimed eliminating the 30-day period will force a party to file for preliminary relief from a district court prior to the Department's decision, when ripeness is an issue – resulting in an inefficient use of party and judicial resources. *Response:* The new rule does not eliminate the opportunity for a negotiated resolution of issues prior to the issuance of a final decision to acquire land in trust. State and local governments receive notice of the submission of a trust acquisition application, and a State or local government may negotiate with the applicant to resolve any disagreements or address any contingencies prior to the issuance of a final decision to acquire land in trust. Post-*Patchak*, a party can seek judicial review of a final decision to acquire land in trust under the APA regardless of the trust status of the land at issue. The parties may determine for themselves whether pursuing an injunction is an efficient use of resources in any particular case.

Several commenters recounted the history leading up to the addition of the 30-day waiting period to § 151.12 in 1996, noting that it cured a “legal infirmity” by providing a clear avenue for judicial review. A few commenters asserted that the rule is seeking to “nullify” or circumvent the Supreme Court’s decision in *Patchak*. *Response:* We generally agree with the history of the 1996 rulemaking as recounted by these commenters, but the legal and practical basis for the 30-day waiting period added to § 151.12 in 1996 no longer exists following the *Patchak* decision. The new rule accepts and implements the Court’s holding in *Patchak* by removing a provision made unnecessary by the Court’s ruling.

A few tribal commenters stated that there is no compelling reason to revise the rule and risk re-litigation of the constitutionality of the Secretary’s authority to acquire land in trust under the IRA. Some commenters stated that the timing of the rule is ill-advised given recent changes in the law related to trust acquisitions under the IRA, including the Supreme Court decision, *Carcieri v. Salazar*. *Response:* The constitutionality of the Secretary’s authority to acquire land in trust under the IRA is settled. *See, e.g. Michigan Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008); *South Dakota v. United States Dep’t of Interior*, 423 F.3d 790, 799 (8th Cir. 2005); *Shivwits Band v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005). The new rule simply clarifies the Secretary’s exercise of that authority.

Self-Stay of Decisions

Several commenters opposed changing the Department’s prior practice of, in some instances, agreeing to stay the implementation of a trust acquisition decision after the expiration of the 30-day waiting period in § 151.12 during the pendency of a lawsuit challenging the decision. Other commenters supported ending the current practice, stating that it essentially provided parties who merely file a complaint with several years of *de facto* injunctive relief,

without meeting the burden of proving such relief is warranted. *Response:* The Department agrees that the self-stay practice could result in several years of *de facto* injunctive relief for a potentially meritless claim, and, like other Federal agencies (including decisions involving the Federal Government acquiring land), wishes to implement its final decision upon issuance. Agencies typically do not stay implementation of their decisions for the duration of the applicable statute-of-limitations period, and the new rule will require that the Department implement its decision upon the fulfillment of the necessary requirements.

Make All Decisions Effective Immediately (Even at BIA Level)

Several tribal commenters suggested that the new rule should make trust acquisition decisions issued by BIA officials effective immediately and require interested parties that appeal the decision to affirmatively seek a preliminary injunction from the IBIA to stay the implementation of the decision during the pendency of the IBIA appeal. Commenters posited that these procedures would encourage early decisions on the merits of an appeal and shift the burden to appellants to stay the full implementation of the trust acquisition decision. These commenters pointed to 43 CFR 4.21 as an example of a process and related standards that could be adopted in the trust acquisition context. *Response:* The new rule retains the existing administrative appeal process for BIA officials' decisions. Administrative review of BIA officials' trust acquisition decisions before land is taken into trust is appropriate because it ensures consistency in the decision-making across BIA regions and addresses any procedural errors before the decision becomes final for the Department.

Judicial Review Prior to Implementation of Decision

Some commenters stated that the action of acquiring the land in trust prior to judicial review compromises the litigants' ability to achieve due process and a fair and impartial hearing.

One commenter stated that this rule would allow land to be put into trust for a controversial gaming project without any prior hearing before a court. Several commenters specifically asserted that the rule violates section 705 of the APA because it allows for transfer into trust before an affected party could file a lawsuit challenging the decision, thereby depriving courts of “their authority to review trust transfers.” *Response:* Under the new rule, the transfer of the land into trust may occur before a lawsuit has been filed challenging the decision. The *Patchak* decision makes clear that absent other legal or procedural barriers, judicial review of a final decision to acquire land in trust may be available under the APA regardless of the trust status of the land. Also, under the part 151 process, State and local governments receive notice of the application and may submit comments for consideration by the decision-maker, whether AS-IA or a BIA official. With respect to comments regarding the applicability of APA section 705, we disagree that plaintiffs have a right to injunctive relief under that section. *See, e.g., Corning Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 562 F. Supp. 279 (E.D. Ark. 1983).

Availability of Remedy

Several commenters expressed concern that remedies or meaningful relief would not be available once the land is taken into trust because the tribe could assert sovereign immunity, opt not to intervene in a lawsuit challenging the trust acquisition, and/or proceed with development of the property in a manner not permitted under State or local law, creating “facts on the ground,” and arguing reliance on the approval and vested interests. *Response:* These comments rely on several assumptions, including the assumption that the decision to take land into trust is not valid. We believe the reasons favoring the removal of the 30-day waiting period, as stated elsewhere in this preamble, outweigh the speculative risks put forward by the commenters’ hypothetical scenarios and potential outcomes.

Opportunity for Judicial Review of Claims Still Barred by the Quiet Title Act

Several commenters pointed out that, following *Patchak*, parties who seek to quiet title to the property to be acquired in trust are still barred by the Indian lands exception to the QTA's waiver of United States sovereign immunity from suit, and that such parties would be precluded from challenging the trust acquisition decision once the transfer of the land into trust occurs. These commenters further stated that the mechanisms available to prevent a trust acquisition when there is a competing property interest could fail, leaving the party claiming the competing interest without a judicial remedy. *Response:* The decision-making process set forth at part 151 requires a thorough title examination prior to the issuance of a decision. The Department takes all reasonable and necessary steps to uncover any adverse claims to the property before acquiring the land in trust. In addition, the applicant secures title insurance for the property, adding another measure of certainty that the applicant and the decision-maker have taken all reasonable and necessary steps to ensure that anyone with a competing interest in the property is identified, and their interest is resolved, prior to the transfer of the property into trust. Given the exhaustive nature of the title examination process and the limitations of judicial remedies on persons who do not record their property interests, the likelihood that a person with a valid competing interest in the property will not be identified is too low to justify delaying implementation of every final decision.

Constitutional "Taking"

A few commenters stated that the rule raises constitutional "takings" issues because the land is "taken" into trust without judicial review. One commenter asked how an acquisition decision could be issued for land that is not owned by the tribal applicant. Another commenter stated that a "takings implication assessment" under E.O. 12630 is required because a party

whose adverse claim in the property is not identified and addressed during the title examination would be precluded from judicial review under the Quiet Title Act. *Response:* Land acquisitions completed pursuant to 25 USC 465 are voluntary transactions and do not involve the exercise of the eminent domain authority of the United States. In all cases, the land at issue is voluntarily transferred from the applicant or another party to the United States to be held in trust for the applicant. The Department takes all reasonable and necessary steps to identify and resolve competing claims on the property before issuing a decision to acquire the land in trust and completing such trust transfer.

Exhaustion of Administrative Remedies

Several commenters objected to the exhaustion of administrative remedies requirement, stating that the rule precludes legal challenges and insulates BIA decisions from judicial review. Other commenters suggested that the exhaustion requirement be more explicit in the rule.

Response: The existing rule includes the requirement that interested parties exhaust administrative remedies under 25 CFR part 2 and was reflected in administrative and judicial decisions. This final rule adopts the suggestion that we highlight this requirement for parties who oppose a BIA decision, making the law in this area more transparent and giving parties more knowledge of the ramifications of failing to make a timely appeal.

Applicability of Quiet Title Act to State and Local Governments

Several commenters asserted that justification for the rule is flawed because there is still “substantial uncertainty” as to the application of *Patchak* in specific fact situations, involving State or local governments. *Response:* The Department will not speculate on how a court may apply *Patchak* in hypothetical fact situations.

Who the Decision Maker Should Be

Some commenters recommended that the AS-IA issue all trust acquisition decisions because the process for administrative review of BIA officials' decisions is slow, extending the timeframe of uncertainty regarding the trust status of the property. These commenters were also concerned that future Administrations may require that all trust acquisition decisions be decided by BIA officials to delay the finality of trust acquisition decisions. *Response:* Requiring administrative review of BIA officials' trust acquisition decisions is appropriate for reasons stated elsewhere herein. Moreover, the exhaustion requirement ensures that opponents of the trust acquisition decision must file a timely administrative appeal before seeking judicial review. This requirement addresses the risk stemming from *Patchak* that lawsuits challenging decisions will not be filed until years after the decisions are made.

Some commenters stated that they would like the rule to specify when AS-IA will be the decision maker. *Response:* We did not accept this suggestion, as AS-IA retains discretion to issue any decision.

One commenter suggested the Deputy Assistant Secretary should issue all decisions that AS-IA would otherwise decide, to allow the decisions to be administratively appealed to the IBIA. *Response:* AS-IA retains the discretion to issue a decision or assign responsibility to a Deputy Assistant Secretary to issue the decision under 25 CFR 2.20(c). Trust acquisition decisions issued by the AS-IA involve several levels of internal review prior to issuance.

Finality of AS-IA Decisions

A few commenters noted that AS-IA decisions are generally final for the Department unless AS-IA "provides otherwise in the decision" under 25 CFR 2.6(c). One commenter noted that an interested party may administratively appeal a BIA official's decision except, among other limitations, when it is approved in writing by the Secretary or AS-IA under 43 CFR

4.331(b). The commenters suggested clarifying this in the rule. *Response:* We have not incorporated this into the new rule because AS-IA trust acquisition decisions are final for the Department when issued. The AS-IA retains the discretion to approve a BIA decision in writing, making it final for the Department.

Administrative Appeal Delays

Several commenters requested adding a provision that would allow tribes to opt out of the administrative appeals process and have AS-IA take jurisdiction, without the time restrictions currently in place at 25 CFR 2.20. Some requested allowing tribes to opt out if IBIA fails to issue a decision by a deadline. *Response:* We determined that an opt-out provision would not be appropriate, to retain both AS-IA's discretion under 25 CFR 2.20 and the mandatory requirement that administrative remedies be exhausted by any party who wishes to seek judicial review.

A commenter suggested mandating that IBIA summarily dismiss appeals that are filed for the purpose of impeding the right of tribes to make use of their trust lands. *Response:* We did not incorporate this comment because it is unclear whether IBIA could summarily determine the intent of an appeal without a full look at the merits. Moreover, changing IBIA procedure is outside the scope of this rule.

Taking Land out of Trust

Several commenters questioned whether the Department has authority to convey land out of trust as a result of an APA challenge and opined on whether *Patchak* affects that authority to take land out of trust. *Response:* *Patchak* did not decide, or even consider, whether the Secretary is authorized to take land out of trust. If a court determines that the Department erred in making a land-into-trust decision, the Department will comply with a final court order and any judicial remedy that is imposed.

Effect on the Trust Relationship

A few tribal commenters stated that challenging the decision to acquire land in trust is less intrusive to the trust relationship than challenging the status of lands already held in trust.

Response: Balancing these few comments with the overwhelming support of other tribes, the Department has determined that taking the land into trust as soon as possible after a final positive trust acquisition decision supports our trust relationship more than an open-ended stay of the trust transfer in all cases.

One tribal commenter stated that the rule does not account for situations where one tribe challenges a decision to take another tribe's land into trust on the basis that it would violate the Federal trust responsibility owed to the opposing tribe and challenges such tribe's jurisdictional authority. *Response:* These issues are considered during the part 151 decision-making process.

See 25 CFR 151.8, 151.10.

How Soon After Decision Land Is Taken Into Trust

Some tribal commenters requested that the rule require the Secretary to "immediately" take land into trust following the decision to acquire land into trust, rather than "promptly."

Response: We have incorporated this suggestion in the regulatory text, subject to the fulfillment of Departmental requirements once the decision is issued.

Another tribal commenter suggested changing "shall" promptly acquire the land into trust to "may" to allow the Secretary more flexibility. *Response:* Retaining the word "shall" to require prompt acquisition of the land better supports IRA policy goals, as previously discussed.

A few commenters noted that the proposed rule states that the AS-IA will take land into trust "on or after" the decision and fulfillment of requirements, while BIA will take the land into trust "upon fulfillment" of the requirements. These commenters suggested imposing a time limit

on taking land into trust. *Response:* The date when decisions of BIA officials become final for the Department varies because such decisions are subject to administrative review and, during the period between the date the BIA official issues a decision and the date such decision is final for the Department, issues may arise that require resolution prior to the trust transfer. For these reasons, we decided not to adopt the suggestion that we impose a time limit on taking land in trust; however, we have slightly changed the text of the rule to make temporal requirements as consistent as possible.

A few tribal commenters requested clarification of the “other Departmental requirements” that the Department must comply with before taking land into trust, deleting this phrase, or replacing it with “statutory and regulatory requirements.” *Response:* Departmental trust requirements may change in the future by statute, through notice and comment rulemaking, or through established procedures for changing Departmental policy. Instead of amending this rule each time to reflect such changes, we chose to retain the phrase “other Departmental requirements.”

Title Work

Several tribal commenters requested modifying the rule to require BIA to perform the title examination and all the paperwork necessary for conveyance before the trust acquisition decision becomes final for the Department. Some also suggested collapsing the preliminary title opinion (PTO) and final title opinion (FTO) into one title opinion. *Response:* These suggestions were not adopted. As discussed above, BIA officials’ decisions become final for the Department after exhaustion of administrative review, so the amount of time between the issuance of a trust acquisition decision and the date that decision becomes final for the Department varies. BIA performs as much work as possible during the 30-day administrative

appeal period. Some aspects, such as the Certificate of Inspection and Possession (CIP), must be completed soon before the acquisition so that the Department has up-to-date information about site conditions and possible unrecorded claims to the land, and thus, it is appropriate for BIA to wait and see if the decision is appealed before it conducts the CIP.

Notice and Opportunities for Public Participation

Several tribal commenters stated their support of the rule's clarifications on what types of notice will be provided depending on whether the AS-IA or a BIA official issues the decision, and that State and local governments having regulatory jurisdiction over the land to be acquired continue to receive written notice of BIA officials' decisions. Other commenters stated their concern that they will not have notice of the application or notice of the decision before land is taken into trust. *Response:* The existing regulations at 25 CFR 151.10 and 151.11 require BIA to provide State and local governments notice of the application. In practice, BIA also sends notice of the application to any party who has submitted a written request for notice. This rule codifies existing practice by requiring written notice to State and local governments when a BIA official makes the decision. It also clarifies and broadens notice requirements, first, by requiring written notice of BIA official decisions to interested parties who have made themselves known in writing and, second, by publication of the decision and information concerning the administrative appeals process in a newspaper of general circulation serving the affected area to reach unknown interested parties. Notice of AS-IA decisions will continue to be published in the Federal Register. While this publication may occur after the land has been acquired in trust, State and local governments and other interested parties have opportunities to participate in the process prior to the decision, and we have revised the rule to reflect that publication of notice of the decision in the Federal Register must occur "promptly" after the decision.

Several commenters objected to having two sets of notice requirements depending on who issues the decision and offered preferences for how notice for all decisions should be provided. Many of these commenters were under the mistaken impression that, under the existing rule or current practice, notices of all decisions were published in the Federal Register.

Response: Under the existing rule, the Secretary could publish notice in either the Federal Register or in a newspaper. Publication of all notices in the Federal Register would be cost prohibitive. It has been AS-IA's longstanding practice to publish notice of its final trust acquisition decisions in the Federal Register and BIA's longstanding practice to publish notice of its decisions in the newspaper of general circulation serving the affected area. The purpose of each type of notice depends upon who issues the decision: notice of BIA decisions provides notice that administrative review of the decision is available; notice of AS-IA decisions provides notice that the decision is final. Thus, we believe that two different methods of providing notice are appropriate.

A few commenters stated that making an oral comment at a public meeting should be sufficient to identify themselves as an interested party and satisfy "exhaustion of administrative remedies." *Response:* Requiring a party to identify themselves in writing to receive written notice of a BIA official's decision helps to ensure that BIA receives accurate contact information for the interested party. An oral comment at a public meeting may not always convey this necessary information and will not, in all cases, establish that the speaker wants to receive written notice of the decision. Further, making a comment at a public meeting about a pending application does not exhaust administrative remedies as required under this part. Administrative review of a BIA official's decision can occur only after such decision is issued. In addition, administrative review involves a determination of "whether BIA gave proper consideration to all

legal prerequisites to the exercise of BIA’s discretionary authority, including any limitations on its discretion that may be established in the regulations.” *See City of Yreka, Cal. et al. v. Pac. Reg’l Dir.*, 51 IBIA 287, 294 (2010), *aff’d sub nom. City of Yreka v. Salazar*, 2011 U.S. Dist. LEXIS 62818 (E.D. Cal. June 14, 2011), *appeal dismissed*, No. 11-16820 (9th Cir. Feb. 21, 2013). The burden is on appellant to demonstrate that BIA erred in its decision-making or that the decision is “not supported by substantial evidence.” *Id.* A verbal comment to a Department official on the application does not meet this burden.

A few commenters stated that the tribe should “exhaust” its obligation to participate before every BIA decision maker, arguing that a tribe should not be able to raise as a defense to a legal challenge any argument it has not filed with BIA. *Response:* It would be unreasonable to expect any party to ever fully anticipate and raise defenses to all claims that could ever be made against its interest at some point in the future. Further, there is no obligation for the tribal applicant to participate in every stage of the administrative review of a BIA official’s decision.

A commenter stated that there should be more notice to State and local governments, citing other Federal laws and the U.S. Constitution. *Response:* Notice to State and local governments under this rule is adequate for the purposes of implementing the IRA. The purposes and processes of other statutes differ and are not instructive here. Further, the constitutionality of the IRA is well established.

Some commenters requested the rule replace “interested parties” with “parties” to clarify that participation in the administrative process does not give a party standing to bring suit, which must be independently established. Other commenters suggested incorporating 25 CFR 2.2’s definition of “interested party” by reference. *Response:* We clarified that “interested party” is defined by 25 CFR 2.2 (“any person whose interests could be adversely affected by a decision in

an appeal”). To obtain a decision from the IBIA on the merits of their appeal, an interested party must establish they were adversely affected by the decision. *See Anderson v. Great Plains Reg’l Dir.*, 52 IBIA 327, 331-32 (Dec. 10, 2010).

One commenter stated that the proposed rule incorrectly concludes that it is not subject to the Paperwork Reduction Act (PRA) because the requirement that interested parties make themselves known is an information collection. *Response:* The regulations at 25 CFR part 151 have approved information collection requirements under OMB Control Number 1076-0100; however, this rule does not add any new information collection requirements within the meaning of the PRA. *See* 5 CFR 1320.3(h).

In addition, we incorporated commenters’ following suggestions: clarifying that the date of receipt of the notice of decision begins the 30-day appeal period for applicants, known interested parties, and State and local governments; requiring notice to State and local governments as well as other interested parties be “promptly” provided; and eliminating the requirement that interested parties make themselves known at each stage of administrative review of a BIA official’s decision.

Implementation

A number of commenters requested that Part 151 be implemented in specific ways, e.g., by ensuring that notices are issued concurrently, listing individual trust applications and decisions on the website, and making clear in each notice that administrative exhaustion applies. *Response:* While these comments are outside the scope of the rule, we will consider them for implementation.

Several commenters suggested updating the Fee-to-Trust Handbook and notice forms to comport with these regulatory changes and releasing the updated Handbook with the final rule.

Commenters also requested that BIA draft the Handbook for use by affected parties, rather than for internal BIA use, and make it available for public comment upon revision. *Response:*

Revisions to the Handbook will be made to comport with the new notice procedures in this rule as soon as possible. As the Handbook is internal guidance and does not impose requirements on parties other than BIA personnel, prior notice and comment before revising is not necessary.

Miscellaneous

A few commenters stated that the rule makes the fee-to-trust process less transparent, more favorable to tribes, and more difficult for challengers. *Response:* The rule is intended to increase transparency by explicitly stating the process for issuing trust acquisition decisions and the availability of administrative or judicial review of such decisions. We declined to accept commenters' suggestion to cross-reference certain provisions of 25 CFR part 2 because the rule is intended to make the processes in this specific context (of trust acquisition decisions) as transparent as possible. The new rule simply accepts and implements the Court's holding in *Patchak* by removing a provision made unnecessary by the Court's ruling. The rule does not increase the difficulty for other entities; rather, it provides for notice to State and local governments and other interested parties to alert them to the availability of administrative or judicial review.

A few commenters provided comments on circumstances regarding specific cases that are currently in litigation. *Response:* We decline to address these comments because they are the subject of current litigation.

A few commenters supported requiring appeal bonds, while one commenter opposed requiring appeal bonds. *Response:* The regulations governing the imposition of administrative appeal bonds are beyond the scope of this regulation.

A commenter suggested considering imposing deadlines for all trust acquisition decisions. *Response:* Because the circumstances surrounding each trust acquisition are unique, it is not feasible to impose meaningful deadlines.

A commenter suggested the new rule treat off-reservation acquisitions differently. *Response:* There is not sufficient justification for treating off-reservation acquisitions differently in § 151.12.

A few tribal commenters suggested requiring AS-IA and BIA to consult the tribe immediately prior to taking land into trust, to ensure there have not been changed circumstances that would make acquisition undesirable for the tribe. *Response:* Under current practice, we ask that the applicant alert BIA as soon as possible if there are any issues that may prompt the tribe to withdraw its application.

One commenter asserted that a State must cede jurisdiction over land for it to come under tribal jurisdiction. *Response:* No such requirement exists.

Several commenters suggested changes to other CFR parts. *Response:* We will consider these requests in prioritizing future regulatory changes.

V. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches

that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations and provide greater notice and clarity to the public.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to appeals of acquisitions of Indian land.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or

unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable “taking.” A takings implication assessment is therefore not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule ensures notification to State and local governments of a BIA official’s decision to take land into trust and the right to administratively appeal such decision. This rule also ensures notification to State and local governments of an AS-IA official’s decision through publication in the Federal Register.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments,” Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on

federally recognized Indian tribes and Indian trust assets. During development of the rule, the Department discussed the rule with tribal representatives. Following publication of the proposed rule on May 29, 2013, the Department distributed a letter to all tribes seeking written comment on the proposed rule and held a tribal consultation session on June 24, 2013, in Reno, Nevada. Section IV of this preamble summarizes comments received by tribes, as well as other comments received throughout the public comment period, and responds to each.

I. Paperwork Reduction Act

This rule does not contain any information collections requiring approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 151

Indians-lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 151 in Title 25 of the Code of Federal Regulations as follows:

PART 151—LAND ACQUISITIONS

1. The authority citation for part 151 continues to read as follows:

AUTHORITY: R.S. 161; 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat.

1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

2. Revise § 151.12 to read as follows:

§ 151.12 Action on requests.

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary – Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish in the Federal Register a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies

are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

Dated: November 4, 2013

Kevin K. Washburn,
Assistant Secretary – Indian Affairs.

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